Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-1520

In the

Supreme Court of the United States

October Term, 1986

RUSSELL ANDERSON,

Petitioner,

vs.

ROBERT E. CREIGHTON, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

The Respondents believe the questions presented by this case can be more accurately and thoroughly stated as follows:

Is the Qualified, or So-Called Good Faith Immunity Defense, Available to a Law Enforcement Officer Who Conducts a Warrantless, Presumptively Unreasonable, Search in Violation of the Fourth Amendment?

Is Summary Judgment Appropriate Before Permitting Discovery When a Rank-and-File Law Enforcement Officer Claims He Is Entitled to Qualified Immunity and the Facts Necessary to Establish the Immunity Are Based on His Own Ex Parte Affidavits?

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v.

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ON WRIT OF CERTIORARI
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APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF

CONSTITUTIONAL PROVISION

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly

describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

The Respondents, Sarisse and Robert Creighton are husband and wife who reside with their children in a home they own in St. Paul. Sarisse Creighton is the sister of Vadaaïn Dixon, who was the object of the warrantless search conducted by police and the FBI at the Creighton home on November 11, 1983. The Petitioner, Russell Anderson, is an F.B.I. agent who led the search. The Creightons were never suspected of being involved in any of Vadaain Dixon's criminal activities. Although the Petitioner's brief sets out rather thoroughly the criminal history of Vadaain Dixon, there is notably little detail in describing the search of the Creightons' home, which led to this litigation.

The Search of the Creightons' Home

On November 11, 1983, Sarisse Creighton picked up her husband from work

at about 4:00 p.m. Together they left Robert's work place to finish their shopping, driving their maroon 1976 Oldsmobile.

Sometime between 7:30 and 8:00 p.m. they returned home. Sarisse Creighton went upstairs to go to sleep. Their three daughters were playing quietly; Robert Creighton was watching television. (J.A. 47, 43).

Suddenly, a spotlight flashed through the windows of their home. Robert Creighton went to the front door, turned on the porch-light, and opened the door. He saw a uniformed police officer on his step with a shotgun, and other uniformed officers and plainclothes men walking up to his home. Some of the other men brandished shotguns. (J.A. 43-44).

According to Officer Snyder, Robert Creighton asked what they wanted. (See

report of Officer W. Snyder).[1] A uniformed officer, Sergeant DeNoma told him to "keep his hands in sight." The officers then went into the Creighton home. Robert Creighton immediately objected to the officers entering his home without a search warrant. (See Report of W. Snyder).

Robert Creighton insists that neither the uniformed officers nor the plainclothes men offered any explanation for their presence. In response to his demand for a search warrant, Sergeant DeNoma replied, "We don't have a search warrant. I don't need a search warrant; you watch too much TV." (J.A. 44).

The three young Creighton girls began to cry and scream when the officers entered the house. Robert Creighton asked

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[1]This report is not reprinted in the Joint Appendix but is part of the appellate record.

the officers to put away the guns because of the children. They refused. (J.A. 44).

Sarisse Creighton awoke to the shrieking of her children and the shouting of her husband, and ran downstairs. On the stairway, she encountered a man pointing a shotgun at her. She became terribly upset and asked what was happening, but no one responded. (J.A. 47).

Sarisse then saw her husband attempting to make a phone call to his father. She ran upstairs and picked up a telephone extension, telling Robert to hang up, afraid that the officer downstairs would harm him. She then told Mr. Robert Creighton, Sr., her husband's father, that the police were searching their home and that she did not know why. She asked Mr. Creighton, Sr. to come over immediately. (J.A. 145).

Sarisse ran back downstairs, where she saw and heard the officers yelling at

her three daughters to "sit their damn asses down and stop screaming." An officer said to her, "Why don't you make your damn kids sit on the couch and make them shut up?" (J.A. 48). At the same time, the officers were shouting and arguing with her husband saying they did not need a search warrant. Her husband asked them to leave. (J.A. 46).

At that point, Sarisse went upstairs with two officers. They stood in the doorway of each of the three bedrooms, but did not enter them, or look in the closets or under the bed. They did not search the third floor of the house. (J.A. 46).

When she returned downstairs, she saw her husband go down to the basement. Two uniformed officers preceded him and a plainclothes man followed. Petitioner remained upstairs with her. She then heard the officers beating her husband. (J.A. 46).

Robert Creighton had been on his way to the garage to show the officers his car. When he reached the bottom step, Sergeant DeNoma was standing between him and the door to the garage. When Robert attempted to open the door, DeNoma struck him in the face. He fell back and struck his head on the wall, and his mouth and forehead began to bleed. (J.A. 44). Shaunda, the Creighton's 10-year-old daughter, witnessed the assault. She started screaming and crying, and later told her mother that an officer hit her. (J.A. 48).

Sarisse Creighton picked up the phone to call her mother, terrified that the police were going to kill her husband. As she attempted to place the call, an officer kept kicking and grabbing the phone, telling her to "hang up that damn phone." (J.A. 48-49).

At this point, Sarisse told her children to run out the front door and go

to her neighbor's house for safety. The children ran out and a plainclothes officer chased them. Sarisse was told by her neighbor, Roxanne Johnson, that this man picked up Shaunda and shook her. Later that night, Shaunda was taken to the hospital and treated for an injury to her arm. (J.A. 49).

The Petitioner States: "I Don't Need a Damn Search Warrant When I'm Looking for a Fugitive."

Family members and friends had begun to come into the house about this time. Sarisse Creighton herself asked Petitioner for a search warrant. He replied, "I don't need a damn search warrant when I'm looking for a fugitive." (J.A. 50).

Robert Creighton, Sr., arrived and saw his son handcuffed and bleeding. He asked Anderson for a search warrant. Again, Anderson replied that they did not need one. (J.A. 58).

The Earlier Searches

Anderson and the armed contingent of officers searched two homes before the Creightons'. At approximately 8:00 p.m., he and the other officers assembled in a parking lot a block from the home of Iris Dixon, the mother of Vadaain Dixon and Sarisse Creighton, then went to her home. (J. A. 19-20).

When Iris Dixon came to the door, Anderson was on the step with a number of officers armed with shotguns. She recognized Anderson because he had questioned her in a prior investigation concerning Vadaain. Iris Dixon heard Anderson say something about a warrant for Vadaain Dixon's arrest. Anderson and the other officers entered without her permission. Iris Dixon did not resist because she feared she and her son, Jamie, would be hurt, but, she did ask Anderson for a search warrant. Anderson again said he did not need one. (J.A. 54).

The officers who entered by the front door went to the back door and let in more armed officers. The officers searched all the rooms and closets in her house. Iris Dixon, terrified, began to cry. (J.A. 49).

During the search Anderson questioned Jamie Dixon about why his driver's license showed his residence as 908 Aurora. Jamie explained it was the home of his grandmother, Minnie Dixon. Iris Dixon pleaded with Anderson not to go to Minnie Dixon's home because Minnie, who was in her seventies, and Minnie's uncle, who was 86 years old, had recently been ill. When Anderson left, Iris Dixon called Minnie Dixon to warn her and told her to let the police in and to cooperate. (J.A. 55).

Anderson then went to Minnie Dixon's home. He states that she consented to their entry and search. (J.A. 21).

The Visit and Interrogation by the Marshalls and Probation Officer on Thursday, November 10, 1983

On Thursday, November 10, 1983, the day before these searches, two United States marshalls and a federal probation officer, William Johnson, visited Iris Dixon's home. (J.A. 56). They were investigating Vadaain Dixon's failure to return to a half-way house called the Volunteers of America. They questioned both Iris Dixon and Sarisse Creighton, who was at her mother's house, concerning the whereabouts of Vadaain Dixon. The women told these agents that they did not have any information about Vadaain Dixon. The officers told them their cars were "okay." Sarisse Creighton assumed this meant that the officers were satisfied that Vadaain didn't have the vehicles. The officers left and did not visit the Creighton home to look for Vadaain Dixon. (J.A. 51).

The Lawsuit

The Creightons sued Anderson pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), alleging he violated their Fourth Amendment rights by conducting the warrantless search. After requesting an extension of time to respond to the complaint, Anderson moved for summary judgment. He never filed an answer. The District Court did not allow the Creightons any discovery.

Anderson's and Johnson's Affidavits

Russell Anderson submitted an affidavit with the motion for summary judgment. William Johnson, the federal probation officer, also submitted an affidavit two days before the summary judgment hearing. Anderson's affidavit stated that on November 11, 1983, prior to 3:30 p.m., a bank in St. Paul, Minnesota had been robbed, within a short time he suspected that Vadaain Dixon had robbed the bank. (J.A. 17-19). To confirm his

suspicion, Anderson arranged for the bank tellers to view a photo spread. According to Anderson, the tellers identified Vadaain Dixon. (J.A. 19).

Anderson also states that one of the police officers had been told by a person in the neighborhood of the bank that the robber may have escaped in "a burgundy or maroon and silver car, possibly a Buick. Other witnesses said it was a darker color." (J.A. 17-18).

Anderson further states that he knew Cheryl Dixon, Vadaain's wife and his alleged accomplice in other robberies had lived with the Creightons until November 9, 1983. (J.A. 21). Johnson's affidavit states that he told Anderson this on November 10, 1983, the day before the warrantless searches. (J.A. 39). Johnson claims that Cheryl and Vadaain Dixon had told him this information in a pre-sentence investigation conducted on November 1, 1983. (J.A. 39). Although

Johnson and the marshalls had allegedly known this for at least two days and Anderson for a least one day before the search of the Creighton home, they did not look for Vadaain Dixon at the Creighton home until the full armed contingent arrived the night of November 11, 1983.

According to the Creightons, Cheryl Dixon did not live with them, and Vadaain Dixon never visited their house. (J.A. 45, 47).

One essential fact is undisputed. Anderson did not even attempt to secure a search warrant by any means, including the telephone warrant procedure.

SUMMARY OF ARGUMENT

The Court of Appeals correctly reversed the district court's summary judgment in favor of the Petitioner, which had been granted before discovery, because factual issues existed concerning probable cause and exigent circumstances. The

Petitioner maintains, however, the undisputed facts show he violated the Creightons' clearly established rights under United States v. Steagald. The Petitioner now admits that the district court should have allowed discovery, thus he, in effect, confesses error.

The Respondents also urge the Court not to adopt the Petitioner's broader case-specific qualified immunity standard because it is inconsistent with the holding and the aims of Harlow v. Fitzgerald, 457 U.S. 800 (1982). Further, new Justice Department's policy developments also make any further extension unnecessary. Finally, the Respondents maintain that the Petitioner's proposed standard would change the law of the Fourth Amendment making warrantless searches presumptively unreasonable to a new standard: when in doubt, search. The proposed standard would also extend the good faith exception to the exclusionary

rule to the exigent circumstances context. The twin applications would stunt constitutional growth and diminish the Rule of Law. Therefore, the Respondents maintain that the Court of Appeal decision be affirmed in all respects, but with leave to file their own summary judgment motion establishing the Petitioner's liability as a matter of law.

ARGUMENT

THE COURT OF APPEALS DID NOT ERR BY REVERSING THE SUMMARY JUDGMENT IN FAVOR OF PETITIONER.

A.
The Court of Appeals Correctly Denied the Petitioner Qualified Immunity Because the Legal Standards Governing His Conduct and the Creightons' Rights Were Both Clearly Established.

The Court of Appeals correctly held that the Petitioner was not entitled to summary judgment because the legal standards governing his actions and the Creightons' constitutional rights were both clearly established at the time he

searched their home. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court held that government officials would be shielded from civil damages if their unconstitutional conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

The Court further stated:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.

Harlow, 457 U.S. at 818.

The district court in this case did not answer the question whether the law was clearly established. (Pet.App. 25a n. 5). Instead, the court granted summary judgment, before allowing discovery, on the ground that the Petitioner's actions were legal because he had probable cause and because exigent

circumstances justified the search of the Creighton home.

The Court of Appeals reversed because of factual disputes in the record concerning the existence of probable cause and exigent circumstances. The Court of Appeals also denied the Petitioner qualified immunity because the Creightons' "fourth amendment rights and the exigent circumstances doctrine were 'clearly established.'" (Pet.App. 16a.) Therefore, the Court of Appeals remanded the case for trial, reserving the Petitioner's right to prove probable cause and exigent circumstances as a defense to a properly instructed jury.

There is ample support for the Court of Appeals' ruling. Steagald v. United States, 451 U.S. 204 (1981), conclusively established that an officer searching for a felon in a third party's home must have a search warrant unless exigent circumstances imperatively call for action

without prior judicial approval. See also Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (If exigent circumstances are claimed, "there must be a showing by those seeking exemption that the exigencies of the situation made that course imperative") (citing McDonald v. United States, 335 U.S. 451, 456 (1948)); Chimel v. California, 395 U.S. 752, 761 (1969) (absent "grave emergency" a warrant must be obtained from a magistrate).

The factors considered by the Court of Appeals in determining the legal standard for exigent circumstances were derived from Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).

The Petitioner now urges on the Court a broader qualified immunity standard than that defined in Harlow or its progeny. Significantly, the Petitioner does not challenge the Court of Appeals' rulings that (1) the general legal standard defining the Creightons'

constitutional rights was clearly established, (Pet. Brief 14), and (2) that the Petitioner "should have known his particular conduct was governed by a particular legal standard." (Pet. Brief, 15).

Rather than asserting that these standards were not clearly established, the Petitioner suggests that because the established standard did not state a "bright-line" rule sufficient to inform a reasonable official that his conduct violated the Constitution, he was erroneously deprived of qualified immunity. (Pet. Brief 11).

The Petitioner's proposed standard turns on the "specific facts" and circumstances of the case. (Pet. Brief 16). The Petitioner now concedes that this standard cannot be applied without

permitting discovery.[2] (Pet. Brief 33-34 n. 18).

The Petitioner's proposed standard conflicts with the clearly articulated goals of Harlow. The Harlow decision rejected the malice element of the Court's prior formulations of qualified immunity and instead formulated "objective" good-faith in an attempt to eliminate the need for discovery before a ruling on

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[2]The Court should note that this in itself is a confession of error. The Petitioner served a summary judgment motion in lieu of an answer to the complaint. No discovery has ever been performed in this case. Indeed, the Petitioner maintained in his summary judgment motion that discovery should not be permitted, he opposed a motion for reconsideration made to the trial court requesting discovery, and he argued on appeal that discovery was properly denied.

qualified immunity. The Court plainly envisioned that, by eliminating the element of malice, a trial court could answer a purely legal question on summary judgment. In Mitchell v. Forsyth, 472 U.S. __, 86 L.Ed.2d. 411, 426 (1985), the Court wrote as to the trial court's duty:

> All that it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . .

86 L.Ed.2d at 426. See also id. n. 9 ("We emphasize . . . the appealable issue is purely a legal one: whether the facts alleged by the plaintiff, or, in some cases, by the defendant, support a claim of violation of clearly established law.")

The standard the Petitioner claims should be applied -- one that admittedly involves discovery -- is not the "immunity" envisioned by Harlow, which was aimed at resolving cases without discovery into the defendant's state of mind.

Rather, the Petitioner would bring the defendant's state of mind back into the inquiry by making relevant the defendant's knowledge of the "facts and circumstances" of each case. That is the type of inquiry Harlow expressly eliminated.

The interpretation the Court of Appeals applied is perfectly consistent with qualified immunity cases decided by this Court after Harlow. In Mitchell v. Forsyth, 472 U.S. ____ 86 (1985), the Court was presented with the question whether a wire tap to gather information on national security, ordered by the Attorney General without a warrant, violated clearly established law. This question, as the Court noted, had been specifically left open in Katz v. United States, 389 U.S. 347 (1967). The practice of using wire taps in national security matters without prior judicial approval had been well established since 1940, and district court decisions addressing the

issue supported the Attorney General's action before the wire tap in Forsyth. Moreover, a statute appeared to authorize the tap. After the Forsyth tap took place, the practice was declared unconstitutional in United States v. United States District Court, 407 U.S. 297 (1972). Consequently, in Forsyth the Court ruled that the Attorney General was entitled to immunity. The Court only answered the purely legal question, which it found to be "open" or not clearly established at the time he acted. 86 L.Ed.2d 431.

The Court's analysis in Forsyth of the procedure for determining whether to grant summary judgment also shows the trial court in this case erred:

> Unless the plaintiff's allegations state a claim of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that

> violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

86 L.Ed.2d at 425 (citations omitted). In this case, the plaintiffs' pleadings plainly alleged the violation of clearly established law, so dismissal before discovery was not appropriate, and the factual disputes already apparent in the record, as the Court of Appeals ruled, precluded summary judgment.

In Davis v. Scherer, 468 U.S. 183, 82 L.Ed.2d 139 (1984), the Court addressed a situation similar to that in Forsyth. A state had dismissed an employee without a formal hearing. No case in the Fifth Circuit or this Court "establish[ed] that the appellee was entitled to more elaborate notice of a more formal opportunity to respond, than he did in fact receive." 82 L.Ed.2d at 148 n. 10.

In fact, a Court of Appeals case held to the contrary. Id. at 148. Therefore, this Court held the appellee had not demonstrated a violation of his clearly established constitutional rights and thus qualified immunity was appropriate. Id. Again, this case turned on a purely legal question.

The Court of Appeals decision in this case is also consistent with Malley v. Briggs, 475 U.S. 89 L.Ed.2d 271 (1986). The officer in Malley applied for an arrest warrant, which a magistrate issued. After the warrant was executed, the plaintiffs, who were never charged, sued, claiming the warrant application completely lacked probable cause. This Court remanded, stating the trial court was to determine whether the actions were "objectively reasonable." This principle is entirely consistent with the Eighth Circuit's decision in this case, because in Malley the officer applied for a

warrant. If an officer applies for a warrant, close cases should be decided in his favor. But when a warrant is not used, as in this case, close cases are decided against the officer. United States v. Ventresca, 380 U.S. 102, 106 (1965). (This principle and its application to this case are discussed more thoroughly below in section B).

The real and grave danger of Petitioner's proposed standard is its scope. Under this standard there would be immunity for nearly all discretionary acts. The Petitioner unabashedly states:

> If the legal principle established a bright-line rule sufficient to inform a reasonable officer that his particular conduct violated the Constitution, immunity would not be appropriate. But many, if not most, legal standards do not establish such bright-line rules.

(Pet. Brief 11)(emphasis added).

The Petitioner catologs some Fourth Amendment standards which, if violated in

"case-specific" instances he claims should result in immunity because they do "not in any way enable a government official to determine whether his conduct was permitted under the Constitution." (Pet. Brief 11). These standards are reasonable suspicion, probable cause, and exigent circumstances. Under the Petitioner's avaricious standard, nearly any actor exercising a scintilla of judgment would be entitled to immunity for unconstitutional acts. For, as the Petitioner himself recognizes, nearly all applications of law require judgment.

Under the proposed standard, most persons who suffer "case-specific" constitutional injuries including the completely innocent Creightons would have no redress. And in effect, this standard would eliminate the right by eliminating the remedy.

This insidious proposition would have been condemned by Chief Justice Marshall, who wrote:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60, 69 (1803).[3]

The standard urged by the Petitioner would actually impede the development of the law and the bright-line rules he himself sees as the only reliable guides for official action.

Our law has developed case by case. Our constitutional rights have evolved in

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[3] III Blackstone, Commentaries on the Laws of England 23 (1768) "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."

litigation. After all, the Fourth Amendment is only a single sentence, unlike the commercial code or federal tax regulations. Nothing is new about the principle that litigation is the method by which our rights develop. This process is part of our common law heritage. See generally 10 W. Holdsworth, A History of English Law 650 (1938): "[T]he law of the constitution, the rules . . . are not the source but the consequence of the rights of individuals as defined and enforced by the courts."

The bright-line rules which the Petitioner claims are the only ones he can reasonably rely on simply will not be developed by the courts under his standard. Certainly innocent persons will have no incentive to litigate where a bright-line rule has not been established -- which, as the Petitioner admits, will be most areas of Fourth Amendment law.

The "case-specific" standard proposed by the Petitioner would impede the development of Fourth Amendment law for two reasons. First, the general remedy for Fourth Amendment violations in the criminal context, the exclusionary rule, is co-extensive with qualified immunity in the civil context. See Malley v. Briggs, 475 U.S. ___, 89 L.Ed. 271 (1986)(applying same standard of good faith where there is a warrant in both exclusionary rule and civil immunity contexts.) See also United States v. Leon, 468 U.S. ___ 82 L.Ed. 677 n. 23 (1984); and id. at 734 n. 35 (Brennan, J., dissenting).

Second, other remedies such as declaratory or injunctive relief would not be available in most case-specific violations of the Fourth Amendment. See generally Brinegar v. United States, 338 U.S. 160, 182 (Jackson, J., dissenting).

The extension of qualified immunity sought by Petitioner also conflicts with the doctrine of the Rule of Law, which is central to our constitutional and common law heritage. Since the time of Bracton, the principle that "the King is under God and the law" has been proclaimed and reaffirmed by our judges. Coke lost his position as Chief Justice of the King's Bench, in part, because he quoted Bracton to an enraged King James: "Rex non debet esse sub homine, sed sub deo et lege." 1 Campbell, Lives of the Chief Justices of England 279 (1873); see also R. Pound, The Spirit of Common Law 60-84 (1921).

The principle that the King is under the law does not mean the King could be personally proceeded against, for a corollary maxim was that "the King could do no wrong." The principle was effected by subjecting the King's ministers, through whom he acted, to the regular courts of justice. Blackstone wrote,

after stating the presumption the King could do no wrong:

> But injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes methods of determining errors and misconduct of those agents.

3 Blackstone's Commentaries at 255 (emphasis in original); see also 10 W. Holdsworth, History of English Law at 651.

Dicey states one aspect of the doctrine of the Rule of Law meant:

> [E]quality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

A. Dicey, Law of the Constitution 202-203 (9th ed. 1956).

The Rule of Law was also wholly endorsed in the earliest cases of this Court construing the Constitution. In Marbury v. Madison, Chief Justice Marshall wrote:

> The government of the United States has been emphatically termed a government of laws, and not of men. It certainly will cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

1 Cranch at 163.

Of course, there is a tension between any immunity that exempts an official from suit and the doctrine of the Rule of Law. Clearly this Court has recognized immunities, but they must not be extended to "most" areas of law, as the Petitioner urges, especially if the purpose of the immunities will not be served. To decide otherwise is a license for lawlessness.

In formulating qualified immunity, this Court has been primarily concerned

with two perceived evils: (1) is the potential over-deterrence that the threat of damage suits may have on officials; and (2) the disruption of their work by prolonged discovery. If these perceived evils are not eliminated by immunity, or if other methods of eliminating them are available, the Court must not broaden the immunity doctrine because it will have a detrimental effect on the case-by-case development of law and the doctrine of the Rule of Law.

The extension of immunity proposed by Petitioner is not necessary to eliminate these twin evils. It neither eliminates the need for discovery, nor prevents "over-deterrence," because the Justice Department has now adopted a policy of reimbursing officials for attorneys fees and damages resulting from suits. See "Statement of Policy Concerning Indemnification of Department

of Justice Employees, 51 Fed. Reg. 207021 (1986)(amending 28 C.F.R. 50.15).

States have also moved to protect officers from the consequences of damage suits resulting from official duties without depriving those wronged of a remedy. See 5 F. Harper, F. James, & O. Gray, The Law of Torts §29.0 n. 19-20 (2d. ed.)(listing state statutes providing for insurance and indemnification).

The Justice Department's policy decision to indemnify employees for damages resulting from constitutional torts is designed to eliminate the same evil as the broadened immunity the Petitioner urges on the Court. Both remedies are not needed.

The Petitioner has chosen only the most general language from this Court's opinions, then stretched it beyond all reasonable bounds to create a new qualified immunity that would displace official accountability for wrongs and

stunt constitutional growth. The unprecedented standard the Petitioner proposes should be rejected resoundingly.

B.

An Executive Agent Is Not Entitled to Qualified Immunity for Conducting A Warrantless, Presumptively Unreasonable Search Because Immunity in this Context Would Drastically Change the Substantive Fourth Amendment Law.

The Court should reject the qualified immunity standard contrived by the government because it will alter firmly established principles of Fourth Amendment jurisprudence. The Fourth Amendment exigent circumstances doctrine presents unique issues not present in other areas of the law. Specifically, the proposed standard ignores the essential presumption that warrantless searches of a home are presumptively unreasonable, see, e.g.,Welsh v. Wisconsin, 466 U.S. 740 (1984), and that "in . . . doubtful or marginal case(s) a search under a warrant may be sustainable where without one it

would fall," United States v. Ventresca, 380 U.S. 102, 106 (1965). See also United States v. Leon, 468 U.S. __, 82 L.Ed.2d 677, 693 (1984). The sinister result of applying the defense as envisioned by the Petitioner would be to create a new rule: when in doubt, search. The correct rule is, was and should be: when in doubt, get a warrant.

The dilution of the constitutional preference for warrants directly conflicts with this Court's recent efforts to encourage government agents to use warrants by eliminating the exclusionary sanction when warrants are technically deficient. See United States v. Leon. In Leon the court endorsed a presumption of good faith when an officer searches pursuant to a warrant. 82 L.Ed.2d. at 698-699. The warrant process therefore provides an immunity which is nearly unqualified and provides the best

protection for an officer who searches homes. Cf. Malley v. Briggs.

The rule making warrantless searches of homes presumptively "unreasonable" is perhaps the most firmly established rule in Fourth Amendment jurisprudence. See Welsh v. Wisconsin, 466 U.S. at 740 (1983); Welsh v. United States, 451 U.S. 204, 211-12 (1981); Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Chimel v. California, 395 U.S. 752, 761 (1969). This principle's origins lie deep in the common law and stem from the sanctity accorded a person's home. Coke reported Semayne's Case early in the 17th century, in which the court stated "that the house of everyone is to him as his castle and fortress." 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603). Unreasonable invasions of colonists' homes spurred the Revolution and led to the

adoption of the Fourth Amendment[4] which specifically mentions "houses." The Court emphasized in Payton:

> In . . . [no setting] is the zone of privacy more clearly defined that when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes that at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.

445 U.S. at 589-90 (quoting Silverman v. United States, 365 U.S. 505, 511 (1960)).

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[4]See generally T. Taylor, Two Studies in Constitutional Interpretation 38-44 (1969); J. Landyski, Search and Seizure and The Supreme Court 30-48 (1966); N. Lasson, The History and Development of the Fourth Amendment of the United States Constitution 51-105 (1937).

This Court has given the home the greatest protection against searches by executive agents and has repeatedly emphasized that "It is axiomatic that the physical entry of the house is the chief evil against which the wording of the Fourth Amendment is directed." Welsh v. Wisconsin, 466 U.S. at 748 (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)). The court has secured the protection of the home by making warrantless searches presumptively illegal. See Welsh v. Wisconsin.

Here, the government argues that an executive agent, who searches without a warrant in perceived exigent circumstances, should be immune from damages under Bivens. Such a ruling would mean the good faith exception to the exclusionary rule developed in Leon would apply and permit the use of any evidence seized in the criminal context. Malley v. Briggs, ___U.S. ___ (1986) (exclusionary

standard used in warrant context defines qualifed immunity in civil context). Clearly, in other words, the good faith exception of Leon in the warrant context will be subversively extended to the exigent circumstances context. The government has barely addressed this issue, hoping no doubt it will be decided sub silento. See Pet. Brief 20-21 n. 12. The government vaguely suggests that automatic application of the good faith exception would not follow, id., but on the contrary, deciding this case in favor of the government will lead to that result. Indeed, the Court would be justified in suspecting this is one of the government's major if unacknowledged goals in this litigation .

The Court should reject the government's devious approach because to accept it would be to rewrite the substantive law of the Fourth Amendment. There would remain no means of enforcing

the presumption against warrantless searches in so-called "case specific" instances. Justice Jackson recognized this dilemma, dissenting presciently in Brinegar v. United States:

> We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection . . . an illegal search and seizure usually is a single incident, perpetuated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.

338 U.S. 160, 182.

In the exigent circumstances context, absent the essential safeguard of a neutral magistrate, neither injunctive

nor declaratory relief is possible. Therefore, if an effective damages remedy is destroyed -- as it would be under the Government's bright-line theory -- destroyed too would be the precept that "a search under a warrant may be sustainable, where without one it would fall." United States v. Ventresca, 380 U.S. at 106. In shambles, too, would be the principle that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches", Welsh v. Wisconsin, 466 U.S. at 740-50. The police would exchange a heavy burden for a constitutional carte blanch entree into our homes.

This dilution of the warrant requirement cannot co-exist with the frequently repeated admonitition that the protection of the Fourth Amendment depends so greatly upon a magistrate making a probable cause determination, rather than an unrestrained, zealous "officer engaged

in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1947).

The warrant requirement is virtually synonymous with the judiciary's essential role in enforcing the Fourth Amendment. The magistrate ensures at least a neutral determination of probable cause, and scrutiny of the particular description requirement, and the warrant application and return process places the court in a supervisory role over government agents and police. Otherwise, the search is regulated by nothing but the conscience of the officer conducting it. Again as Justice Jackson warned:

> We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit . . . And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless

> officers as well as by the fit and responsible. . . .

Brinegar v. United States, 338 U.S. at 182 (Jackson, J., dissenting).

Warrantless searches of innocent persons' homes will never even come to the judiciary's attention unless civil suits are brought. Indeed, if the Creightons had not sought damages, the judiciary would have remained blissfully unaware of the warrantless searches of three innocent parties' homes. This is nearly perfect illustration of the type of situation where an officer should hesitate, and have a heavy burden of justifying a presumptively illegal act. He is clearly forewarned of potential liability. "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." Harlow v. Fitzgerald, 457 U.S. at 819.

The Government's case is ill-chosen, for it asks and attempts to prove too much. Hard cases may make bad law -- but bad cases, in this Court, cannot make hard law. The Court should note that the denial of qualified immunity does not necessarily mean an officer would not have a defense on the merits of probable cause and exigent circumstances. The elimination of qualified immunity simply subjects the officer to suit, consistently with the common law action for trespass. The Court has consistently said that the common law is one source to weigh when determining the scope of immunity. At common law, an officer searching for a fugitive with a fugitive warrant was not immune if he entered the home of a third person and the fugitive was not there. Sir Mathew Hale wrote:

> If a justice of peace issue a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door

> it is refused or neglected to be done, the officer may break open the door to take him; and the same law is, if it be but for suspicion of felony.
>
> And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger, whose house it is . . .

II M. Hale, Historia Placitorium Coronae 116-17 (1736) (citations omitted); see also Entick v. Carrington, 19 How. St. Tr. 1030, 92 Eng. Rep. 807 (K.B. 1765) (in suit for trespass, rejecting officer's justification of warrant issued by an executive official).

Under Hale's standard and the common law as it existed at the adoption of the constitution, the Petitioner would have been liable in trespass for the search of the Creighton home. The exigent circumstances and probable cause defense would appear to be a contraction of common

law liability for searching the homes of third parties for felons.

The Petitioner fails to address the ill effects his rule would have on Fourth Amendment law. Symbollically, he left out the Fourth Amendment as a "constitutional provision involved" in both his Petition and Brief. Cf. Sup.Ct.R. 21(f) and 34(f).

The Petitioner's proposed standard would work a radical change in the Fourth Amendment. Respondents urge the Court to consider the unique issues presented in the Fourth Amendment context and caution the Court if it is inclined to further extend qualified immunity in other contexts, it should not fashion a doctrine uniformly applicable to all constitutional actions for damages. The Court should reject the government's inexorable quest to reduce the Fourth Amendment to a mere ethical consideration.

C.

The Petitioner Violated the Bright-Line Rule of Steagald v. United States By Searching the Homes of Third Parties Without A Search Warrant.

Significantly, the Petitioner has not cited most directly applicable precedent, Steagald v. United States, in either his Brief or Petition. The facts clearly show that the Petitioner believed the legal basis for his search was the fugitive warrant he possessed and that he did not know that Steagald forbids the search of a third party's home without a search warrant. He told Sarisse Creighton, "I don't need a damn search warrant when I'm looking for a fugitive."[5] (J.A. 50). See also (J.A.

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[5]On summary judgment all conflicts in fact must be resolved in favor of the non-moving party and all reasonable inferences from the facts must be also drawn in favor of the non-moving party. Adickes v. Kress & Co., 398 U.S. 654, 655 (1962).

54) (Petitioner told Iris Dixon he did notneed a search warrant). (J.A. 58) (Petitioner told Robert Creighton, Sr., he did not need a search warrant).

Another significant fact is that Petitioner never articulated in his affidavit that he searched pursuant to the exigent circumstances exception to the warrant requirement. (J.A, 16-24). He was never confused about applying the Dorman factors, he just did not know about Steagald, one of the brightest bright-line rules limiting police action in the Fourth Amendment area.

Petitioner's counsel interjected the exigent circumstances analysis "ex post facto" in his Memorandum to the trial court, which was entitled:

> Ex Post Facto review of Russell Anderson's actions shows they were in accord with such established statutory or constitutional standards as existed to guide him.

Defendant Russell Anderson's Memorandum of

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Points and Authorities at 18 (emphasis in the original) (this document is reprinted in the Appendix Record submitted to the Court of Appeals).

The Petitioner's ex post facto objective "case-specific" confusion should not be the basis for immunity because it is apparent that a bright-line rule governed his conduct.

Therefore, the Petitioner is not entitled to immunity under any such standard.

D.

The Court of Appeals Correctly Reversed the Trial Court Summary Judgment in Favor of The Petitioner Because Discovery was Not Allowed and Factual Disputes, Conflicts Over Inferences to be Drawn From Circumstantial Evidence, and Credibility Issues Precluded Summary Judgment.

Clearly the trial court erred in granting the summary judgment in favor of the Petitioner without allowing any discovery, regardless of which formulation of the qualified immunity standard is applied. The Petitioner confesses this

was error. (See Pet. Brief 33 n. 18) ("Where, as here, the defendant's immunity depends on case specific facts such as the information known to the defendant, a limited amount of discovery may be appropriate.") Thus for this reason alone, the Court of Appeals' reversal was appropriate and must be affirmed.

Furthermore, the Court of Appeals correctly decided that factual disputes precluded summary judgment in favor of the Petitioner and made the case one for the jury to decide under proper instructions on probable cause and exigent circumstances.

First, the information Anderson had linking Dixon to the Creighton home was entirely untrustworthy and presented factual issues to be resolved by a jury. Under the Petitioner's ex post facto analysis, this link is a critical fact for both probable cause and exigent circumstances. He claimed that he "knew"

Vadaain's wife had been staying at the Creightons. Actually he did not have any direct personal knowledge concerning her residence. Anderson states in his affidavit:

> "I knew from my investigation of previous bank robberies committed by Vadaain Dixon that Sarisse Creighton was Vadaain Dixon's sister. I also knew that Cheryl Ann Donlin Dixon, Vadaain Dixon's wife, had resided with Robert and Sarisse Creighton from May of 1983, after her arrest in Dallas for the Omaha bank robbery, to November 9, 1983, the day Vadaain Dixon jumped his bond. I also knew that Vadaain Dixon has stayed on a daily basis at the house of Robert and Sarisse Creighton with Cheryl Ann Donlin Dixon during his four-hour furloughs from the Volunteers of America residence from Otober 13 to approximately November 9, 1983." (J.A. 21).

This statement was bolstered by the affidavit of William Johnson. Johnson averred that Cheryl Dixon, Vadaain Dixon's wife, had informed him she had been staying with the Creightons. He also claimed that Vadaain told him Cheryl was

residing there and that Cheryl told him she was using Sarisse Creighton's and Iris Dixon's automobiles. Finally, he said he told the Petitioner this on November 10, 1983, the day before the bank robbery. (J.A. 38-44).

If Johnson's averments are to be believed, he did not know the whereabouts of Cheryl Dixon after November 1, 1983. Therefore, the Petitioner's averment that he knew Cheryl Dixon stayed at the Creighton's until November 9 -- which the Creightons adamantly deny -- is without foundation and directly conflicts with Johnson's affidavit.

Additionally, the information Johnson, a federal agent, based his information on impeaches his blanket statements and calls into question what he actually told Anderson. (Of course, however, one federal officer cannot create probable cause by relaying false information to another. See Whitely v.

Warden, 401 U.S. 560 (1971)). The record contains twenty-seven furlough cards on which Vadaain Dixon -- a bank robber, fugitive and alleged addict -- listed his destinations from October 13, to November 9, 1983. The cards show Vadaain claimed he visited Cheryl at the Creightons' three times, the last time being October 17, 1983. (Again the Creightons adamantly insist this is false). So, even if Vadaain had visited her there briefly, the cards show he had not been there for three weeks.

Johnson and Anderson's statements about "knowing" Vadaain stayed with Cheryl on his four hour furloughs also is significantly impeached by the fact that they never even went to the Creighton home before August 11. Vadaain had been a fugitive for over two days. Anderson knew about it on the 10th. (Anderson also knew all Vadaain's alleged violent propensities at that time).

Why wasn't a search warrant applied for the Creighton residence at this time? The inference is that Johnson and Anderson knew the information they had -- which may not be what they stated in their affidavits -- would not establish probable cause for a magistrate to issue a warrant.

Even if the facts concerning the attenuated, hypothesized connection between the vaguely described getaway car and the Creighton car which did not match the two-tone description, established both the probable cause and the exigent circumstances, these facts are disputed. The F.B.I. press release said no car had been seen. (See Offer of Proof in Court of Appeals' Appendix Record). Also, a neighbor told the Creightons that the officers had been requesting information about a car with yellow plates. The Creightons' license plates were blue and white.

The Petitioner also does not explain why he searched first Iris Dixon's home, then Minnie Dixon's, then the Creighton's. The brief suggests that he searched in that order because of the relation to the homes to the police department. However, this is an inference drawn in favor of the Petitioner which is not appropriate on summary judgment. The reasonable inference to be drawn is that the Petitioner did not know where Vadaain Dixon was, let alone have strong reason to believe he was as the Creighton home. A further, reasonable inference is that he was conducting a general search of all Dixon's associates with his fugitive warrant in violation of Steagald or just shaking down all of Dixon's relatives for information.

It is a difficult law suit for a humble plaintiff to end up in the United States Suprme Court before even getting discovery or an answer to the complaint.

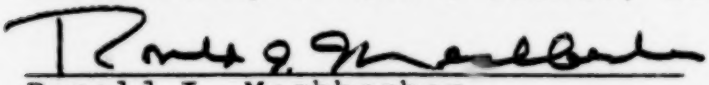
Especially, when the plaintiff's claim is that an agent violated one of the most firmly established bright-line rules in the Constitution. The Constitution should protect innocent people too. We believe that government officials have been subject to suit since the Middle Ages for the claims the Creightons make. The Court will sound the death-knell for most civil rights enforcement through the courts if it were to affirm the district court.

CONCLUSION

For the reasons stated above, the Court of Appeals' decision reversing the summary judgment against the Respondents should be affirmed in all respects.

Respectfully submitted,

MESHBESHER, SINGER & SPENCE, LTD.



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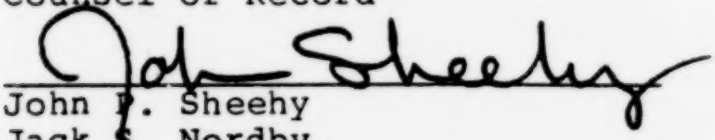

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Dated: October 14, 1986